

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE PAUL J. BARBADORO

Appearances:

For the Government: Nick Abramson, AUSA
Office of U.S. Attorney
53 Pleasant Street
Concord, NH 03301

For the Defendant: Lawrence A. Vogelman, Esq.
Nixon, Raiche, Vogelman, Barry &
Slawsky, P.A.
77 Central Street
Manchester, NH 03101

Court Reporter: Sandra L. Bailey, LCR, CM, CRR
Official Court Reporter
United States District Court
55 Pleasant Street
Concord, NH 03301
(603) 225-1454

1 BEFORE THE COURT

2 THE CLERK: Court is now in session and has
3 for consideration today a hearing on a motion for status
4 of counsel in Criminal Case No. 13-cr-142-01-PB, United
5 States of America versus Johnathon Irish.

6 THE COURT: Mr. Abramson, can you refresh my
7 memory as to what the charges are and what the
8 government's case is against the defendant?

9 MR. ABRAMSON: Yes, your Honor. There are
10 five counts presently charged in this case.

11 There are two 1001 counts based on statements
12 that Mr. Irish made to a federal agent.

13 There's a one count of aiding and abetting the
14 straw purchase of a firearm under 18 USC 922(a)(6).

15 There's one count of engaging in the business
16 of dealing in firearms without a federal firearms
17 license.

18 And there's one count of being a regular user
19 of a controlled substance, that is marijuana, as a
20 possessor of a firearm that has traveled in interstate
21 commerce.

22 With respect to the -- I will start with one
23 of the false statement counts. The evidentiary basis
24 for that count is that Mr. Irish told a federal agent
25 that firearms that were owned by him had been sold to a

1 friend of his, and we have Mr. Irish on a tape-recording
2 a short time later admitting that that was a lie. And
3 during an interview in November of 2013 with Mr. Irish
4 he again admitted to multiple law enforcement agents
5 that he had lied to the agent on that occasion.

6 THE COURT: What was the lie?

7 MR. ABRAMSON: The lie was that he had sold
8 all of his personal firearms to a friend when in fact he
9 had had them placed in another location so that he could
10 retrieve them. There were ongoing state proceedings
11 pursuant to which he was not allowed to possess any
12 firearms.

13 THE COURT: Okay.

14 MR. ABRAMSON: So he told the federal agent as
15 part of the agent's investigation that he no longer
16 possessed them when in fact they had just been placed
17 somewhere else.

18 THE COURT: Okay.

19 MR. ABRAMSON: The second 1001 charge involves
20 a statement to a federal agent that he had asked a
21 federal firearms licensee about the legality of having
22 his wife or then girlfriend straw purchase firearms for
23 him, and the testimony of that individual will be that
24 no such inquiry was ever made.

25 THE COURT: Why would he ask somebody about

1 that? What was the context in which he allegedly made
2 that statement?

3 MR. ABRAMSON: The alleged context is that Mr.
4 Irish was a friend of this individual who owns his own
5 firearms business, and he and his girlfriend had
6 purchased some firearms. His girlfriend came in to sign
7 for the firearms that were in fact for Mr. Irish, and
8 after the fact Mr. Irish told the federal agent that he
9 had spoken at length with the owner of that business
10 before conducting the transactions to insure that it was
11 okay that his girlfriend signed.

12 THE COURT: Oh, okay. So your evidence will
13 be that the girlfriend signed for purchases of firearms
14 which were intended for the defendant and to try to, in
15 your theory, avoid criminal responsibility for a straw
16 purchase he made a statement that, look, before we did
17 this I talked to the owner and it was clear that, and I
18 was told that this was okay, is that --

19 MR. ABRAMSON: That's correct.

20 THE COURT: Okay. So you're saying the owner
21 will come and testify he never had that conversation?

22 MR. ABRAMSON: That's correct. As far as the
23 aiding and abetting the straw purchase count, that
24 involves a separate transaction in September of 2013 at
25 Riley's in Hooksett, New Hampshire.

1 On that date in September his girlfriend again
2 signed for and paid for a firearm that was intended for
3 Mr. Irish in which he, within a few weeks, subsequently
4 sold to a federal law enforcement officer who was
5 operating in an undercover capacity. So --

6 THE COURT: Has the girlfriend been charged
7 with any of these things?

8 MR. ABRAMSON: No, she has not, your Honor.
9 She did testify in grand jury at length as to the
10 details of that purchase and implicated the defendant.

11 THE COURT: So she admitted she did, she
12 admitted she committed a crime of being a straw
13 purchaser for someone else?

14 MR. ABRAMSON: Yes, that is correct, your
15 Honor.

16 THE COURT: So she must be cooperating
17 otherwise you wouldn't -- you would have charged her I
18 assume?

19 MR. ABRAMSON: Yes.

20 MR. VOGELMAN: Just so you know, judge, while
21 we're talking about it, she's in court. I'm just
22 telling you that.

23 MR. ABRAMSON: Right, and to be clear, she was
24 cooperating in the initial stages of the investigation,
25 but her posture has since changed.

1 THE COURT: Okay, so at that time she was
2 cooperating, but she's no longer cooperating, but you
3 haven't charged her to this point?

4 MR. ABRAMSON: Right. We have not charged her
5 at this point.

6 THE COURT: Okay.

7 MR. ABRAMSON: But there is a substantial
8 amount of additional evidence aside from the testimony
9 of the girlfriend, including an admission by the
10 defendant during that November interview with multiple
11 law enforcement agents that he had the girlfriend
12 purchase the firearm for him because he wanted to avoid
13 any potentially lengthy background checks associated
14 with his name being on the 4473.

15 THE COURT: Okay.

16 MR. ABRAMSON: As to the regular user in
17 possession of firearms charge, we have approximately six
18 or seven witnesses who will come in and testify about
19 the defendant's regular marijuana use. Two of them are
20 individuals from whom the defendant regularly purchased
21 marijuana on a weekly basis, and those witnesses will
22 establish that the defendant was a weekly if not daily
23 user of marijuana throughout the course of 2013 when he
24 possessed multiple firearms that had traveled in
25 interstate commerce.

1 And finally the count involving engaging in
2 the business of selling firearms without a federal
3 firearms license, we have several witnesses who will
4 come in and testify that Mr. Irish pitched them to sell
5 them self-built assault rifles. We have approximately
6 60 hours of videotape, obviously not all of which would
7 be presented, but it's a substantial amount of video
8 tape from an undercover operation in which an FBI agent
9 makes three purchases of assault rifles from the
10 defendant for cash. And we have multiple posts on the
11 defendant's Facebook page and text messages in which the
12 defendant essentially brags to friends that he builds
13 and sells assault rifles for a living.

14 And I know that in the previous hearing in
15 this case the U.S. Attorney, John Kacavas, mentioned
16 that it is a complex evidentiary basis for that charge,
17 and I think that's a fair characterization, so I don't
18 know if we need to go into all the tangential evidence,
19 but I think that's a fair summary of the evidence at
20 this point.

21 THE COURT: Okay. Now, just refresh my
22 memory. The defendant originally had another lawyer
23 representing him, and I allowed the defendant to have
24 new counsel appointed because he was dissatisfied with
25 the way his lawyer was representing him.

1 MR. ABRAMSON: That's correct, your Honor.

2 THE COURT: All right. Mr. Vogelman, you have
3 raised some concerns about your client's competency.
4 What do you want to say about that?

5 MR. VOGELMAN: In my conversations with him,
6 discussing this case, discussing his alternatives, his
7 responses, both his emotional responses and the words of
8 responses have given me grave doubts of whether he's
9 competent to really understand what's going on, in the
10 truest sense competent to make a decision as to what he
11 wants to do with the case and competence to assist me in
12 the case.

13 I've been doing this a long time, judge, and
14 I'm pretty good, as you know, with difficult clients,
15 but it's really reached the point where I had serious
16 enough doubts that I thought I had to bring them to the
17 Court's attention.

18 THE COURT: So, do your concerns have anything
19 to do with this defendant's philosophical or ideological
20 views about firearms or anything like that?

21 MR. VOGELMAN: Absolutely not, judge.

22 THE COURT: Okay. So, if he had views about
23 the Second Amendment or firearms rights that were
24 inconsistent with your own views, would that in any way
25 affect your assessment of his competency?

1 MR. VOGELMAN: Absolutely not, judge.

2 THE COURT: Okay. So, let me hear from the
3 defendant about -- normally a proffer from an
4 experienced defense lawyer is sufficient to have an
5 evaluation for competency, and I am -- and that's on the
6 basis of your proffer I have granted that request. Now,
7 I guess the defendant hasn't moved to force you to
8 withdraw. You've just asked for what, a hearing to
9 determine whether you should still represent him?

10 MR. VOGELMAN: His exact words to me over the
11 phone were today file a motion for the status of
12 counsel. I asked if he wanted to get rid of me. He
13 says file a motion for the status of counsel. I guess
14 that's the way the last, when Mr. Saxe was relieved, it
15 was pursuant to that motion.

16 So, I did -- I'm perfectly willing to stay on
17 if he's willing and the Court is willing, but I filed
18 that motion because he was obviously very upset with the
19 fact that I had made a motion to have him examined.

20 THE COURT: All right. All right, thank you.
21 Let me ask the defendant, you asked for this motion to
22 be filed. It was filed at your request. What do you
23 want to say?

24 THE DEFENDANT: Yes, your Honor. First of
25 all, thank you for hearing it, hearing me at this

1 hearing and thank you for, thank you for giving me
2 Attorney Vogelman after the last status of counsel
3 hearing.

4 I apologize, however, that we have to have
5 this hearing regarding this matter. The problem is,
6 your Honor, is Attorney Vogelman seems to think the only
7 reason I wish to not be represented by him at this point
8 in time and further on in this case is only because of
9 his recommendation and request of the competency
10 evaluation. Your Honor, that is only the most recent
11 issue regarding what has been going on.

12 When Mr. Vogelman first met with me, he asked
13 me what it was, what the issues were with Attorney Saxe,
14 and why I was requesting Attorney Saxe be relieved as my
15 defense counsel. And I told him, because Attorney
16 Vogelman told me he did not want to make the same
17 mistakes, I told him do not sit there and attempt to
18 tell me that this case is not connected with that of my
19 daughter's 2010 case. Do not sit there and attempt to
20 tell me that it did not originate from the 2010 case.
21 Do not attempt to call me a liar. Do not allow the
22 prosecution to attempt to continue to threaten me and my
23 daughter and my family in order to get me to take a plea
24 bargain, and do not call me crazy.

25 He has done every single last one of those,

1 your Honor, to the point where in the last meeting about
2 three, three and a half weeks ago Attorney Vogelman
3 looked at me and said there's no connection between this
4 federal case and the case of your daughter in 2010.
5 Your Honor, not only is there a connection admitted by
6 the government in and through their own discovery and
7 through their own summary of the investigation
8 background, they clearly admit that that is the origin
9 for this investigation and why this investigation began.

10 Now, this hearing started out when you asked
11 Attorney Abramson to brief you on and remind you of the
12 current counts and charges that are in front of this
13 Court. Your Honor, what I heard there was more than
14 just a brief description of the counts and charges, but
15 almost Attorney Abramson attempting to try those cases
16 and plead the government's case in front of you --

17 THE COURT: That's what I asked him to do. I
18 asked him to tell me what his evidence would be so that
19 I could understand what you're likely to face in terms
20 of the charge.

21 THE DEFENDANT: Yes, yes, your Honor, I
22 understand, and what I was getting at, I apologize for
23 not getting directly to the point, however, the
24 situation was was that Attorney Abramson more than
25 convoluted and twisted the wording and context of every

1 single last count and their supposed alleged evidence in
2 the matters.

3 Your Honor, I have in front of -- the
4 documentation that my wife provided because I was unable
5 to do so because when I was transferred from Strafford
6 County Department of Corrections to Essex County
7 Department of Corrections, I was not allowed to have any
8 of my legal documentation. I was not allowed to have my
9 discovery. I was not allowed to have any of the
10 documents.

11 I've expressly asked Attorney Vogelman, since
12 he has represented me in this case, to bring me a
13 notebook with almost 80 different pages, front and back,
14 of notated page numbers and briefings of what is on
15 those page numbers specific to each count and specific
16 to outlining and highlighting the facts of the case of
17 the connection and the origin of this case connecting it
18 and originating from my daughter's 2010 case, that of
19 which was immediately dismissed and sealed with a gag
20 order placed by the family court out of Rochester Family
21 Court.

22 Those of which, those court documents that
23 were dismissed and sealed are also involved in this
24 discovery, which they should not be.

25 THE COURT: I'm not -- I'm confused. What's

1 the notebook you're talking about?

2 THE DEFENDANT: The notebook, sir, it's a
3 notebook that I had had the Strafford County that I sat
4 for many hours going through each page of discovery on
5 my thumb drive in the law library, page by page,
6 notating what was on each page that I thought may or was
7 definitely pertinent to the case --

8 THE COURT: And what happened to the notebook
9 or what do you want to have happen to the notebook?

10 THE DEFENDANT: It was subsequently given to
11 Attorney Saxe so he could review it so that I could
12 point out specific cases, specific situations within the
13 case and the discovery to him. Subsequently when
14 counsel switched from Attorney Saxe to Attorney
15 Vogelman, Attorney Vogelman gained custody of the
16 notebook with the rest of the evidence and discovery.

17 THE COURT: And what are you asking?

18 THE DEFENDANT: I have been asking Attorney
19 Vogelman to bring it to me at both the facilities of
20 Strafford County and Essex County so that I can show him
21 specific page numbers because I can --

22 THE COURT: All right, wait. Stop.

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Mr. Vogelman, do you know what the
25 notebook is that he's talking about?

1 MR. VOGELMAN: I know what the notebook is. I
2 don't want to get into a swearing match here, but I will
3 get to him.

4 THE COURT: Will you bring it to him?

5 MR. VOGELMAN: I will.

6 THE COURT: Okay. All right, thank you. Go
7 ahead, what's the next thing?

8 THE DEFENDANT: Thank you, your Honor.

9 However, the situation is that since, due to my transfer
10 to Essex County and myself not being allowed to have my
11 legal documents, they were subsequently mailed and
12 FedEx'd to my family, my mother and my wife. My wife
13 has since, along with my mother, been gracious enough to
14 go through all 2,754 pages I believe or more of
15 documents in discovery and print me out some of, not
16 all, but some of what I've requested of, that of the
17 connection and origin of my daughter's 2010 case, that
18 of the different issues and situations we have with the
19 Special Agent Philip Christiana from the FBI submitting
20 fraudulent information for prosecution to a state
21 agency, that being Chichester Police Department, that
22 Philip Christiana knew was fraudulent, knowing that
23 there was no protection order in place when he forwarded
24 this information to the police department for
25 prosecution of a violation of a protection order, when

1 again, Agent Christiana had full knowledge that there
2 was no order in place, because when the order was
3 dismissed, your Honor, I had contacted Agent Christiana.

4 THE COURT: What does this have to do with Mr.
5 Vogelman?

6 THE DEFENDANT: I apologize for getting off
7 track, your Honor. What this -- this has to do with Mr.
8 Vogelman is because he refuses to see that not only is
9 there a malicious attack against me throughout the
10 investigation and through this entire prosecution, your
11 Honor, he refuses to admit the connection and origin of
12 the case where it is clearly outlined and specified by
13 the government in their discovery.

14 THE COURT: Okay, now, here's where I think
15 you've gotten off track.

16 THE DEFENDANT: I apologize.

17 THE COURT: No, that's fine. And you may not
18 understand the way lawyers have to work with clients.

19 There are certain things that the client, you
20 get to completely decide, your lawyer can't decide for
21 you. One of those things is plead guilty or plead not
22 guilty. That's your decision. He can never make it for
23 you. He can't stop you from doing what you want to do.
24 He can advise you.

25 Another thing that you have complete control

1 over is do I testify or do I not when it comes time for
2 trial.

3 Other than those two things, when you have a
4 lawyer it is -- and there may be a few other minor
5 things, but the things that I want to focus on now, for
6 the most part, is what your defense strategy is going to
7 be isn't up to you. It's up to your lawyer. He decides
8 on your defense strategy and you don't get to decide
9 that. He has an obligation to consult with you about
10 it. He has an obligation to hear you out on what you
11 think the strategy should be, but ultimately he's got to
12 pursue that, so, and I don't want to get into the
13 details between you because I don't want to have him
14 disclose privileged communication, but if he has told
15 you that whether there's a connection or not it's not
16 going to lead to a viable defense for you, that's a
17 decision he has to make.

18 Now, if you don't like that and you want to
19 represent yourself, after I have you evaluated, if
20 you're found to be competent and you want to present
21 whatever kind of theory you want to present, there is a
22 way to do it, and that's to represent yourself.

23 I would strongly advise you against that. It
24 doesn't work out well in practice for the vast majority
25 of people that do it. But you need to understand, your

1 lawyer is not a simple mouthpiece who you can manipulate
2 like a puppet master. He doesn't just say whatever you
3 want to say and do whatever you want to do. He's a
4 professional. You happen to have one of the most
5 experienced criminal defense lawyers we have in the
6 entire state of New Hampshire. You have a defense
7 lawyer who is one of the most committed to protecting
8 civil rights of any of the lawyers we have in the entire
9 state. He's a lawyer who I know by his past experience
10 doesn't care what your political beliefs are, your
11 beliefs about the Second Amendment, what your personal
12 views are. He would defend you if you were a Nazi, a
13 communist, an Arian Nation member, a Black Power, he
14 wouldn't -- none of that I know because of his prior
15 background plays any role in any decision he makes.

16 So, if he has made a judgment that in my
17 review of the case this is the strategy that you need to
18 pursue, you can't tell him no, that's wrong.

19 So, I understand your concern, and I think the
20 way we need to take this is a step at a time. Let's get
21 the evaluation done. And if the experts -- after
22 hearing I'm satisfied that you're competent, then I'm
23 going to come back and ask you do you want to represent
24 yourself or do you want to have Mr. Vogelman continue to
25 represent you. I'm not going to assign another lawyer

1 to you because if you can't work with Mr. Vogelman,
2 you're not going to be able to work with anybody in the
3 United States. So, that will not work.

4 THE DEFENDANT: Yes, sir, your Honor.

5 THE COURT: We will not be able to find you a
6 lawyer who will do everything you say, and that just
7 isn't the way it will work.

8 THE DEFENDANT: Yes, your Honor, I understand,
9 and I was not just speaking -- if I may be allowed to
10 finish what I was speaking on --

11 THE COURT: Well, I'm not going to let you
12 just continue to rant on about your theories.

13 THE DEFENDANT: No, it's not about that, your
14 Honor, at all, and excuse me for interrupting.

15 THE COURT: Okay, go ahead.

16 THE DEFENDANT: I was about to get to the
17 regarding the defense strategies and whatnot.

18 Attorney Vogelman has continuously asked me
19 what I would like to use for a defense for this, what I
20 would like to use for a defense for that. I'm not going
21 to go into it because as far as I'm concerned it's
22 specific attorney/client privilege.

23 There was one specific charge that has been
24 the most largest of concerns. When I would attempt to
25 discuss it with him or ask him questions about it, there

1 was one specific question which would be a definition to
2 it, I guess you could say, or a definition to one of the
3 elements, and he did not give me an answer as to what
4 the definition was. All he would keep telling me is
5 that, no, that's not a defense, that's not a defense.
6 And I said, well, Larry, you tell me what's a defense
7 because there's got to be a defense here somewhere. You
8 can't just tell me there's no defense at all. That was
9 our last conversation we had.

10 Now, in and throughout that last conversation
11 which is where I believe Attorney Vogelman has come up
12 with the opinion that he feels I need the competency
13 evaluation, and what he's speaking to is he continues to
14 see, and I believe that the reason he requested the
15 competency evaluation, is because again, he does not
16 believe the connection between the 2010 case and the
17 origin of the federal case from the 2010 case, which
18 yes, I do consistently and without failure insist on
19 pointing out.

20 THE COURT: Okay. I understand that. And
21 you're entitled to believe anything that you want to
22 believe and no one is going to try to change your mind
23 with respect to any of that. It's a question of whether
24 the proof of that or that defense will be pursued at
25 your trial. And what I'm saying to you is Mr. Vogelman

1 has a duty to listen to you about that. But as your
2 lawyer, he ultimately decides on that after listening to
3 you. You don't decide that. So, and, it sounds like
4 this is very similar to the problem you were having with
5 your last lawyer and it will be the problem you will
6 have with your next lawyer and the one after that and
7 the one after that.

8 So, if you're competent and you want to pursue
9 some argument like that, you'll have to do it on your
10 own. No lawyer will do it for you.

11 THE DEFENDANT: Your Honor, I understand what
12 you're saying. The thing is is that it's not a
13 personal, an arbitrary personal opinion of mine.

14 THE COURT: It's fact, I understand. It's
15 fact in your mind, it's fact.

16 THE DEFENDANT: No, there's no fact in my
17 mind, your Honor, it's fact throughout the discovery
18 that I have paperwork right here from the --

19 THE COURT: Let me ask you this. What is --
20 how does that lead to a defense and a not guilty verdict
21 against you?

22 THE DEFENDANT: It was not meant solely as a
23 defense or a not guilty verdict, your Honor. It was
24 simply meant, because I truly feel that, and as I do to
25 this very second, that the jury and anyone else who is

1 hearing this matter needs to be fully aware of and fully
2 informed of the origin of this case.

3 THE COURT: Okay. Well, as I said, we will do
4 this a step at a time. In listening to you, I mean, I
5 know because I've had prior interactions with you,
6 you're a smart man, you're respectful to the Court which
7 I greatly appreciate, but you are obviously, and I don't
8 fault you for this, deeply, deeply emotionally committed
9 to the belief that this is a retaliatory action by the
10 government stemming from some problem with a case
11 involving your daughter; right? You deeply believe
12 that. I don't think you're making that up in any way.

13 Now, I don't know whether it is or it isn't
14 connected. But what I know is the way you're talking
15 about it, the vehemence with which you're describing it,
16 the insistence on talking about it over and over and
17 over again, is a concern for me about your competence.
18 And that's why I too want to see a psychologist evaluate
19 you just to make sure because, because what you're
20 facing right now is your entire future will depend upon
21 what happens in this proceeding, and if you are not
22 competent, I don't want this proceeding to move ahead
23 against you, because it doesn't get undone.

24 If you are competent, then I want, I will then
25 turn to you and say, look, I don't think it's in your

1 interest to do this, but if you can't go along with
2 whatever the defense is that Mr. Vogelman wants to put
3 up for you, I understand that, the only way you can
4 avoid that is by representing yourself. And even though
5 I will advise you not to do that, that is the only
6 option I can see for you that will allow you to pursue a
7 defense strategy that your lawyer deems as being
8 manifestly against your interests.

9 So, you may have a strong feeling about this
10 and how important it is to bring this out to the public,
11 but if his conclusion is it's not going to help your
12 defense, because his job isn't to help you disclose this
13 to the public, okay, even if it's true, his job is to
14 get a not guilty verdict against, entered in your case
15 so you can walk as a free man, or if he can't do that,
16 get the lowest possible sentence for you that he can.
17 And that's his single-minded focus. And you may have a
18 different agenda, but he can't pursue that agenda to the
19 extent it's against your interests.

20 THE DEFENDANT: Yes --

21 THE COURT: He has to pursue your interests in
22 getting a not guilty verdict. So, I understand your
23 point.

24 THE DEFENDANT: I just -- I don't mean to
25 interrupt, I just want to make it clear, your Honor. In

1 no way, shape or form at all am I wanting to bring this
2 information regarding my daughter's 2010 case out in any
3 way to bring to the public, only to those involved in
4 the case, to show and to prove the retaliatory actions.
5 That is it. It's not like I'm trying to make a
6 spectacle of this, your Honor. To be completely honest
7 --

8 THE COURT: Okay, but let's -- so when we try
9 to figure out, and I can't be your lawyer and --

10 THE DEFENDANT: Yes, sir.

11 THE COURT: -- Mr. Vogelman may have further
12 thoughts about this, but sometimes people in your
13 position say the government prosecution is part of a
14 vendetta. I want to present to the jury as a defense
15 that the government is engaged in some kind of
16 overreaching misconduct.

17 I can tell you that that is a very, very
18 narrow area in which there's ever any viable defense on
19 that ground.

20 Another -- sometimes people will raise things
21 like you're raising to say I want you to attack the
22 government's witnesses for bias, to show they're biased
23 against me so the jury will doubt their credibility.
24 That is a strategy to undermine the credibility of
25 government witnesses to help create doubt, and Mr.

1 Vogelman might or might not determine that pursuing that
2 line of defense is useful.

3 But in the end, it doesn't result in a not
4 guilty verdict by itself. There has to be an
5 overarching defense strategy, which might be as simple
6 as the government can't prove my guilt beyond a
7 reasonable doubt; to the extent you have to depend on
8 witnesses they're not credible either because the
9 government is biased against me or because the witnesses
10 the government has are interested in their own interests
11 over others.

12 There may be ways to work some of this in.
13 But the way you keep going over and over this, this
14 hearing and the last hearing, again, it suggests
15 single-mindedness of thought that to an unbiased
16 observer raises questions about your ability to assist
17 in your defense. And when one person gets so
18 preoccupied and fixated with one part of the case to the
19 point that they can't look at the rest of the case, that
20 raises questions about whether there is something going
21 on with them that calls into question their competency.

22 So, again, I understand your point, and I'm
23 not going to dismiss Mr. Vogelman today, but I'm not
24 going to hold out, I'm going to reserve until I get
25 through the next step of this process, which is to get a

1 competency evaluation of you so I can have an unbiased
2 set of experts look at you -- look you over, look at
3 your prior history and tell me is this a guy who just
4 strongly believes what he believes and is perfectly
5 competent and able to do what he needs to do, or is this
6 a guy who's got something else going on with him.

7 THE DEFENDANT: May I say two more things,
8 your Honor, I apologize.

9 THE COURT: Yes.

10 THE DEFENDANT: One, the other reason that has
11 been a longstanding issue as to a dispute or
12 disagreement I guess can you say between Attorney
13 Vogelman and I, he refuses to -- he asked me if, you
14 know, if I felt there was anything that needed to be
15 suppressed by a motion. And I told him the first thing
16 which, that of which I did not even have access to the
17 grand jury testimony of my wife until, what, roughly
18 three months ago, Larry, Attorney Vogelman?

19 MR. VOGELMAN: Less.

20 THE DEFENDANT: Roughly two or three months
21 ago or so, that of which there are two pages missing out
22 of it which I still have not gotten, I believe 19 and
23 21. Regardless, your Honor, in both the interviews and
24 grand jury testimonies, to this date it has been said to
25 everyone who has spoken to her, she does not remember

1 anything because of her levels of intoxication. And
2 Attorney Vogelman refuses to file motions for
3 suppression on that.

4 THE COURT: Well, okay, I'm confused. What
5 are you suggesting should be suppressed, her testimony?

6 THE DEFENDANT: How could -- well, what I
7 don't understand, your Honor, is how could any interview
8 or grand jury testimony be admissible or even be allowed
9 into evidence if the individual was under the influence,
10 that of which all controlled questions were, by
11 controlled questions I mean questions such as your name,
12 date of birth, where you were born, background, so forth
13 so on, all those types of questions were asked
14 throughout the interviews and throughout the grand jury
15 testimonies except the questions of are you under the
16 influence of any controlled substance or alcohol.

17 THE COURT: Okay. Here is what I, again, I'm
18 trying to think this through. So you're assuming that
19 your wife won't in fact be called to testify.

20 THE DEFENDANT: Oh, I know she -- they're
21 threatening to subpoena her. And the government --

22 THE COURT: And are you trying to keep her
23 from being allowed to testify in court or are you saying
24 I think if she is called she will take the Fifth
25 Amendment, and then the government will try to introduce

1 the grand jury transcript, and if they try to introduce
2 that, we should keep it out?

3 THE DEFENDANT: Your Honor, all I can tell
4 you, I refuse to speculate on that, all I can tell you
5 is what I have been informed of, that of which is that
6 consistently my wife has continuously and consistently
7 and repetitively said she does not remember to the point
8 where she breaks out in tears because she can't remember
9 and feels so bad for it.

10 THE COURT: Okay --

11 THE DEFENDANT: And, excuse me, your Honor, in
12 the last meeting three and a half weeks ago in which
13 Attorney Abramson was present with myself, Attorney
14 Vogelman and two other individuals, he informed me, this
15 is the first time they did not threaten to press charges
16 on Stephanie and indict her federally for the same
17 charges I'm on if I did not take the plea bargain, this
18 time he simply says that we will, Attorney Abramson says
19 we will compel her, compel Stephanie to testify at
20 trial, and if she claims she does not remember or
21 changes her story, we will charge her with perjury and
22 we will read the grand jury testimony to the jury, as
23 well as Attorney Abramson attempted to say that she
24 would not be allowed to take the Fifth Amendment.

25 THE COURT: Okay. I can't think of -- you

1 appear to be complaining that Attorney Vogelman will not
2 file a motion to suppress. It's not clear to me whether
3 you want her live testimony to be what you call
4 suppressed or whether you want the --

5 THE DEFENDANT: I apologize if there's a
6 different word for it, your Honor.

7 THE COURT: Well, it matters in this way
8 because there are, you don't -- in my experience here
9 people have never filed motions to suppress something
10 like this. Suppression motions are in almost all cases
11 filed based on a claim that physical evidence was
12 obtained in violation of the Fourth Amendment or
13 confessions of the defendant were obtained in violation
14 of Miranda rights or were coerced in violation of the
15 Fifth Amendment or were obtained in violation of a right
16 to counsel. Occasionally you find motions to suppress
17 out-of-court identifications based on Sixth Amendment
18 rights. What you're talking about is ordinarily handled
19 more in the nature of an objection to testimony when
20 it's offered or a motion in limine to bar the testimony.
21 But I can't -- I don't -- I'm not aware that there's any
22 grounds to prevent your wife from being required to
23 testify based on the grounds that she gave a prior
24 statement while intoxicated. Nor am I aware of any
25 basis to keep out the prior statement on the grounds

1 that you say that she was intoxicated.

2 But we're so far away from that now, I can't
3 even begin to speculate about whether there's some way
4 to attack that or not, but you need not fear that you're
5 going to lose the right to challenge that. If there is
6 a right to challenge it, it can be done when the
7 testimony is offered at trial.

8 THE DEFENDANT: Your Honor, I don't mean to
9 interrupt. My biggest fear, and I apologize after 2010
10 when it comes to any threat against my family, that's
11 the only thing that scares me. That's my Achilles heel
12 and everyone knows it. Simply by threatening or being
13 able to prosecute for perjury for not remembering one's
14 testimony, which completely contradicts, for the record,
15 completely contradicts that of those individuals at the
16 gun stores and that of the owner and things he has told
17 other employees of the store, but that's something for
18 trial and it's been on its own.

19 The fact that what -- I'm afraid that if this
20 -- if her grand jury testimony is allowed to be brought
21 in and she's put on the stand, because she does not
22 remember. As far as I can tell, from what I hear in her
23 voice when she tells me, I truly not believe she does.
24 And the only way she will is if she reads her grand jury
25 testimony, and seeing that, what is in her grand jury

1 testimony is again a complete contradiction to what
2 other facts and other testimony by individuals in the
3 case. And that in itself would be -- could be
4 considered perjury, your Honor. So it honestly feels
5 like a catch 22 or a double-edged sword for her if she
6 gets on.

7 THE COURT: I understand, and listen, this is
8 a very difficult thing for you. I understand you're
9 emotional about it. It's not surprising that you would
10 care for your family. I think we need to take this a
11 step at a time, okay? Let's just do it a step at a
12 time.

13 Let's get the evaluation done. And I am
14 concerned based on, and I'm not in any way being
15 critical because as I say, you are being very good at
16 being respectful to the Court which I very much
17 appreciate.

18 THE DEFENDANT: I'm not some common street
19 punk, your Honor.

20 THE COURT: And I appreciate the way that
21 you're being respectful to the Court, but this is -- I
22 can tell by the way you're describing things, the
23 cadence that you're using, the intonation that you're
24 using, the emotionality, the fixation on the particular
25 matters that are so concerning to you, that they are

1 potentially overwhelming you and overwhelming your
2 ability to work with not just Mr. Vogelman, work with
3 anybody, because it's so got you right now.

4 So let's get that evaluation done and figure
5 out if anything is going on that I need to get you some
6 help on, and after I do that then we will come back and
7 we will do the status of counsel hearing again, and if
8 you want it, and if you want another lawyer, we will
9 explore what your options are.

10 THE DEFENDANT: May I explain my only concern
11 about the competency evaluation, your Honor?

12 THE COURT: Just briefly because we've been at
13 it --

14 THE DEFENDANT: I apologize. You know, if
15 they for whatever reason do not find competency, which I
16 highly doubt that will be an issue, you know, there's no
17 reason for them not to find competency; however, if they
18 do, and correct me if I'm wrong, my understanding is at
19 that point they will then, the evaluator or this Court
20 will then find a, well, make a finding and decision
21 whether or not I am restorable for trial; correct?

22 THE COURT: Correct.

23 THE DEFENDANT: As far as I know, the only way
24 to restore one for trial especially with alleged mental
25 disease or defects would be through that of medication.

1 THE COURT: It could also be non-medication
2 therapeutic intervention, but generally speaking, that's
3 right, you would probably -- I would probably commit you
4 to a facility for a period of time to be, undergo
5 therapy and perhaps medication and, say, for example, if
6 there was a diagnosis of bipolar disorder, something
7 like that, that there are medications that can help
8 people with those disorders --

9 THE DEFENDANT: Your Honor, I don't mean to
10 cut you off. I cannot take medication. Because of my
11 traumatic brain injury, all medications have what's
12 known as an adverse effect meaning they do the opposite.
13 Mainly antidepressants make me severely depressed.

14 THE COURT: Well, I had forgotten. You may
15 have mentioned this before. But you had a traumatic
16 brain injury in the past which is another reason for
17 concern here. Medication may not be the answer. If --

18 THE DEFENDANT: Doctors and therapists have
19 clearly stated that my form of therapy, because I
20 physically cannot open up or speak to somebody who I do
21 not personally know and trust, so therefore multiple
22 doctors, including my own personal physician, and my
23 wife and I even have letters to this effect stating that
24 we have therapy dogs because of this, and the biggest,
25 the biggest issue and the absolute biggest reason of my

1 emotional state now is I've been eight months without my
2 daughter.

3 THE COURT: Okay.

4 THE DEFENDANT: Which is what caused this in
5 the beginning.

6 THE COURT: All right, let's -- here's the way
7 we're going to get through this, okay? I've heard you
8 at length, I understand your views, and I'm sympathetic
9 to the pain that you're suffering, but the only way I
10 can do this is one step at a time. Let's not get ahead
11 of ourselves, okay? We don't have to worry about what
12 happens if I find you incompetent until I get there.
13 And if I do, then we will look at the next steps in the
14 process.

15 THE DEFENDANT: My view, your Honor, is what's
16 going to happen if somebody tries to force me to take
17 medication and I refuse to take medication --

18 THE COURT: Nobody can force you to take
19 medication unless I were to order it, and I would never
20 do that without holding a hearing and giving you an
21 opportunity to be represented on that if you didn't want
22 to take medication. That's a last resort that I would
23 hardly not view lightly. So no one can make you take
24 medication during this evaluation process especially if
25 you say that it has adverse effects on you according to

1 your own treating physician. They will get all the
2 medical records in your background. They will do an
3 evaluation.

4 THE DEFENDANT: Can I ask that we do it
5 through an independent source, not through the
6 government, or is that too much to ask?

7 THE COURT: I -- well, we may need to do
8 another evaluation depending upon what the government --
9 we start with the government, and if you and your lawyer
10 are dissatisfied with that evaluation, then I might
11 consider appointing an independent evaluator outside of
12 the government. But the routine way to do this is an
13 evaluation with the government. So, one step at a time,
14 okay? You hear me --

15 THE DEFENDANT: Yes, sir.

16 THE COURT: I am not going to let you be
17 railroaded. As long as you work with me the way you
18 have been, I will work with you. You may not like the
19 things I do, but I will hear you at each step of the
20 process, and I'm not out to get you --

21 THE DEFENDANT: I never said you were, your
22 Honor, I never meant to insinuate that.

23 THE COURT: No, I know don't. No, I don't
24 think you, I just want to emphasize to you that you work
25 with me, I will work with you, we will take it a step at

1 a time. First step is to get this evaluation done.
2 Nobody is going to force you to take medication. If
3 somebody were to do that, refuse the medication, call
4 Mr. Vogelman, he will schedule a hearing, I'll make sure
5 that nobody will force you to take medication --

6 THE DEFENDANT: Excuse me, but when I
7 attempted to refuse medication in Rockingham County,
8 your Honor, they attempted to -- they threatened to lock
9 me in what they call the hole, solitary confinement.

10 THE COURT: Well, again, Mr. Vogelman, if he
11 reports to you that someone is trying to force him to
12 take medication, you will immediately call up the United
13 States Attorney's office, remind them of the
14 conversation that I've just had with them. If they
15 insist that he needs to be medicated, you will file a
16 request for an immediate hearing, and I will address the
17 issue directly. I'm not saying -- I mean, I can't say
18 how I would rule.

19 THE DEFENDANT: I understand, your Honor.

20 THE COURT: But I will give you a hearing and
21 they can't force you to take medication. It's not my
22 experience that they do that. They may try to persuade
23 you to do it.

24 THE DEFENDANT: I did see it happen in
25 Strafford County and Rockingham County, your Honor.

1 THE COURT: Well, there are some limited
2 occasions where people have been forcibly medicated but
3 it's pursuant to a court order.

4 So, in any event, again, let's just focus on
5 this. Go through this evaluation. Try to be as honest
6 with people as you can be. And if you're right, that
7 you don't have a mental illness that's preventing you
8 from being able to assist counsel, then we will come
9 back and I will ask you what you want to do next.

10 THE DEFENDANT: I have posttraumatic stress
11 syndrome -- I have posttraumatic stress disorder, and
12 antisocial personality that stems from my posttraumatic
13 stress disorder, and attention hyperactivity disorder.

14 THE COURT: I understand. And that's why we
15 have to have an evaluation done, and I think we've
16 covered it. So, hang in there. Do it a step at a time.
17 I will be back with you again after we've done this
18 evaluation, and then we'll revisit the issue of Mr.
19 Vogelman's representation of you if you want to.

20 And in the meantime, Mr. Vogelman, stay in
21 touch with him during the evaluation process. If you
22 should feel at any point that his constitutional rights
23 are in any way being endangered, you'll of course
24 contact the government immediately and notify the Court
25 if necessary to hold some kind of emergency hearing.

1 We'll take it a step at a time and let's see
2 where we are --

3 MR. VOGELMAN: One more thing, judge.

4 THE COURT: Yes.

5 MR. VOGELMAN: Some of the issues that were
6 raised by Mr. Irish that the government and I were
7 sensitive to, the government has been good enough to
8 expedite the service of the trial subpoena on Stephanie
9 so that she could come to the Court and get assigned
10 counsel.

11 THE COURT: Oh, so she can get counsel to
12 represent her?

13 MR. VOGELMAN: Right. So, he had to first
14 serve her with a respect in expedited -- usually he
15 wouldn't be serving trial subpoenas today, but I think
16 --

17 THE COURT: Okay, I think that's a good idea.
18 Let's get a court-appointed attorney for her so she can
19 have her own attorney to protect her interests.

20 MR. VOGELMAN: We have started that process,
21 sir.

22 THE COURT: All right. Anything else?

23 MR. ABRAMSON: Just two quick issues, your
24 Honor, and I'll keep it brief.

25 The first is just with respect to the

1 discovery, I know there was a reference to some
2 confusion about the discovery being transferred to the
3 new facility. I just wanted to assure the Court that
4 Attorney Vogelman and I have taken care of that and he
5 should have access to his discovery material as soon as
6 he's back at the Essex facility.

7 THE COURT: Okay.

8 MR. ABRAMSON: The second issue is just
9 whether the Court feels that an explanation is warranted
10 with regard to the allegations of threats being made to
11 the defendant. I won't get into that if you don't feel
12 it's necessary.

13 THE COURT: At this point I think it's pre-
14 mature. I think we need to get this evaluation done,
15 and then after that, if he wants, if he's making
16 allegations about you that should require some kind of
17 action, you can respond to them, but I think it's
18 premature. I think it's a step -- a step at a time
19 here. I'm satisfied based on my own observations today
20 that we do need to do an evaluation. Beyond that I'm
21 completely open to anything the defendant wants to
22 propose, but I need to first determine his competency
23 because that strongly affects the extent to which he has
24 the option of representing himself and how I evaluate
25 the various arguments he wants to pursue.

1 And so I think we just ought to take it a step
2 at a time, okay?

3 MR. VOGELMAN: There's one further thing. In
4 your order you indicated that the speedy trial act was
5 tolled in the interest of justice, but you also asked
6 for a speedy trial waiver signed by the defendant which
7 I don't think he is --

8 THE COURT: Well, given the questions about
9 his competency that's a standard practice, but I don't
10 think it is -- I'm not going to ask him to waive any
11 rights that he has under the current circumstances
12 because if there's a question of competency, the waiver
13 wouldn't be valid in any event.

14 MR. VOGELMAN: That's why I raised it.

15 THE COURT: And I appreciate you making that
16 point. I don't want to compel him to waive any right
17 that he has. But I stand by my ends of justice finding
18 here that when I do an evaluation, it takes time. We
19 need to continue the trial so we can assess the
20 defendant's competency, but I think that's a good point
21 to protect his interests.

22 THE DEFENDANT: Does anybody know when I will
23 be transferred for the evaluation?

24 THE COURT: It probably would be in the next
25 week or two, but I don't know how quickly that's going

1 to happen.

2 THE DEFENDANT: Does anyone know how long that
3 will take?

4 THE COURT: It takes a long time. I'm
5 thinking 20 days, something like that.

6 MR. VOGELMAN: The statute says they should do
7 it in 30, but oftentimes they do come in --

8 THE COURT: Takes longer. Sometimes longer,
9 sometimes shorter, but it's around that period of time.

10 THE DEFENDANT: Would it be too much to ask
11 that the Court put it at 30 days and no more, whereas
12 this trial is putting a severe strain on my --

13 THE COURT: No, I understand, and I think what
14 we will do is you will be in communication with him and
15 with the government, and the government will inquire
16 after 20 days and tell the -- here's what I think we
17 will do. You'll contact the referring facility and say
18 that the Court has expressed concern that this matter be
19 expedited if at all possible, and it should be completed
20 if possible within 20 days. And if it's not, you'll
21 inquire the status of it and inform Mr. Vogelman. And
22 if the parties believe some further action needs to be
23 taken, you will file it, Mr. Vogelman can file the
24 appropriate motion for a further hearing.

25 So, we will do what we can to expedite it,

1 okay?

2 THE DEFENDANT: Thank you, your Honor.

3 THE COURT: All right. Thank you.

4 MR. ABRAMSON: Your Honor.

5 (Hearing adjourned at 3:20 p.m.)

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 C E R T I F I C A T E

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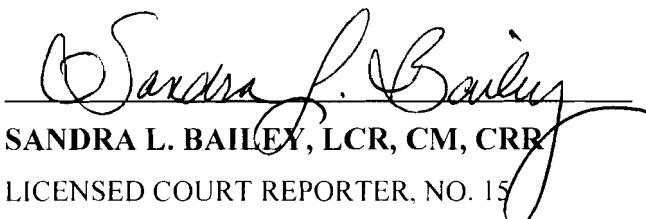
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I, Sandra L. Bailey, do hereby certify that
the foregoing transcript is a true and accurate
transcription of the within proceedings, to the best of
my knowledge, skill, ability and belief.

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19 Submitted: 5/13/2015


SANDRA L. BAILEY, LCR, CM, CRR
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